APPENDIX

(Excerpts from the Court of Criminal Appeals' Decision)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
July 8, 2003 Session

STATE OF TENNESSEE v. STEVEN RAY THACKER

Direct Appeal from the Circuit Courts for Dyer and Lake Counties
Dyer County No. C00-54; Lake County No. 01-CR-8238 R. Lee Moore, Jr., Judge

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No. W2002-01119-CCA-R3-DD - Filed December 18, 2003

[Deleted: Introductory Paragraph]

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed.

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and ROBERT W. WEDEMEYER, J., joined.

Charles S. Kelly, Sr., and Wayne Emmons, Dyersburg, Tennessee, for the appellant, Steven Ray Thacker.

Paul G. Summers, Attorney General and Reporter; Gill R. Geldreich, Assistant Attorney General; C. Phillip Bivens, District Attorney General, and Karen Burns, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

[Deleted: Factual Background]

I. CHANGE OF VENUE

On August 9, 2000, the defendant filed a motion for a change of venue based on grounds that the widespread pre-trial publicity in Dyer County and contiguous counties had resulted in undue excitement against the defendant that would prejudice a fair trial on the merits. A hearing on the motion was conducted on August 25, 2000. At the hearing, Rachel Jacobs, an investigator with Inquisitor, Inc., testified that she researched the various sources of media in the area and obtained packets from the *Commercial Appeal*, the *Dyersburg News*, the *State Gazette*, and the *Tennessean*

newspapers, as well as from newspapers in Springfield, Missouri, and Tulsa, Oklahoma. The collection of articles was extensive and was submitted as evidence. Ms. Jacobs's research of the video media from Memphis area television stations revealed that sixty-nine separate segments on this subject had been aired from the date of the defendant's arrest until July 18, 2000, the day preceding her testimony.

Ms. Jacobs stated that she and another investigator from Inquisitor conducted a random survey in Dyer County concerning the population's exposure to the defendant's case. Thirty-two persons were polled, and of the thirty-two, approximately two-thirds had knowledge about the case. Of the thirty-two people, forty-two percent stated that they did not believe that Mr. Thacker could receive a fair trial in Dyer County.

Ms. Jacobs performed a similar study in neighboring Lake County. Ms. Jacobs discovered that the residents of Lake County received information from basically the same media sources as residents of Dyer County. Ms. Jacobs admitted on cross-examination that she did not conduct a poll of Lake County residents.

At the conclusion of the hearing, the trial court entered the following findings, in relevant part:

> [U]nder the circumstances, where both sides feel like a change of venue is appropriate . . . it would be somewhat amiss for me not to grant a change of venue. So, I think the way we're deal [sic] with that is this: Your motion, as far as the change of venue, will be granted in that the Court will follow the Rules of Criminal Procedure first, which would mean a change of venue to Lake County. I will allow you . . . if you feel like that's something that will – that you need to introduce some additional proof on at a later time, we will allow you to do so. . . . Again, it's not something that's written in concrete at this point. I'm not convinced – I don't know that we have evidence that would indicate that a jury pool out of Lake County would be tainted. I don't know for sure whether or not we will be better having the trial in Lake County or the trial with a Lake County [jury] here. . . . I'll just have to take that under advisement. . . . I don't think the publicity has been such that we cannot seat an impartial jury from Lake County, Lauderdale County, or Gibson County, and I'd want to talk to the judges down there about how we would do that, if we did it. So, the process that will be followed will be taken under advisement, but we will have a change of venue . . . .

The trial court then ordered that venue was to be changed to Lake County.

On May 15, 2001, the trial court revisited the "change of venue" issue. The defendant presented Leigh Anne Hudgings, an investigator with Inquisitor, Inc., to testify regarding her study as to whether the Lake County jury pool was tainted. Ms. Hudgings conducted a random sampling of ninety-seven Lake County residents. The results of the survey reflected that over half of the

people surveyed, 51.1%, had prior knowledge of the crime. Of the 51.1%, 46%, or one out of every four persons surveyed, had already formed opinions of the case. On cross-examination, Ms. Hudgings admitted that she did not attempt to determine whether or not those persons polled were actually qualified to sit on a jury panel.

Evan Jones, editor and publisher of the *Lake County Banner*, testified on behalf of the State. Mr. Jones stated that the *Lake County Banner* provided weekly news to the residents of Lake County. He added that Lake County television markets were generally WPSD in Paducah, Kentucky, and the station in Cape Girardeau. Mr. Jones explained that while Dyer County followed the Memphis television stations, Lake and Obion County watch the Paducah and Cape Girardeau stations. He added that KMIS, a Missouri radio station, broadcasts Lake County football games.

With regard to the defendant's case, Mr. Jones testified that the *Lake County Banner* had only printed two stories about Steven Thacker in the past calendar year. One story ran January 5, 2000; the other on August 30, 2000. Both stories ran on the front page.

After hearing argument from counsel, the trial court made the following findings:

> I don't think . . . that there is sufficient proof that would indicate that we cannot seat a jury that can be fair and impartial from Lake County residents. Again, the worse case scenario is that one out of four has either formed or expressed an opinion. We can pull a big enough jury pool, I think, where we can seat twelve men or women who have not formed or – expressed or formed any opinion as to guilt or innocence in this case, and can have a trial from which the jury can find that issue solely and alone from the evidence that's introduced, and from the law that's charged by the Court. So, your motion will be denied. . . .

The defendant now complains that the trial court "erred grievously in his assessment and understanding of the evidence introduced by [the defendant] at this hearing." He contends that "no matter if you do pull a 'big enough jury pool,' still, according to statistical survey, there will still be one out of four Lake Countians who believe the defendant is guilty!" The defendant states that "the refusal of the . . . trial court to grant the proper change of venue has deprived [him] of a fair trial by an impartial jury of his peers."

The decision of whether to grant a motion for a change of venue based on pretrial publicity rests within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of discretion. State v. Howell, 868 S.W.2d 238, 249 (Tenn. 1993). Furthermore, the defendant must show that the jurors were biased or prejudiced against him before his conviction will be overturned on appeal. State v. Melson, 638 S.W.2d 342, 360-61 (Tenn. 1992). The defendant contends that the trial court failed to determine whether "a fair trial probably could not be had" as required by Rule 21(a), Tennessee Rules of Criminal Procedure, which provides:

> In all criminal prosecutions the venue *may* be changed upon motion of the

> defendant, or upon the court's own motion with the consent of the defendant, if it appears to the court that, due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had.

(Emphasis added); see also Tenn. Code Ann. § 20-4-201(1) (stating venue "*may* be changed . . . upon good cause shown") (emphasis added). Rule 21 further provides:

> In a multi-county judicial circuit a change of venue shall be to the nearest county in the judicial circuit in which the prosecution is pending where the same cause for change of venue does not exist. If the same cause for change of venue exists in all other counties in the judicial circuit, the venue shall be changed to the nearest county where the same cause for change of venue does not exist.

Tenn. R. Crim. P. 21(c).

Jurors need not be totally ignorant of the facts and issues involved in a case upon which they are sitting, but they must be able to lay aside their opinions or impressions and render a verdict based upon the evidence presented. State v. Bates, 804 S.W.2d 868, 877 (Tenn. 1991). Mere exposure to news accounts of the incident does not, standing alone, establish bias or prejudice. State v. Crenshaw, 64 S.W.3d 374, 386 (Tenn. Crim. App. 2001). The test is "whether the jurors who actually sat and rendered verdicts were prejudiced by the pretrial publicity." State v. Kyger, 787 S.W.2d 13, 18-19 (Tenn. Crim. App. 1989). The burden of proof is on the defendant. Id.; State v. Garland, 617 S.W.2d 176, 187 (Tenn. Crim. App. 1981).

The defendant, in addition to citing to numerous newspaper articles and television segments, described as "extremely sensational, attention-grabbing words and pictures," asserts that the short amount of time the jury deliberated at both the guilt and penalty phases was "unconscionable" and indicative that the jurors were tainted by pretrial publicity, "whether they were clearly aware of it or not." However, the defendant has not cited any authority in support of his contention that the brevity of the jury's deliberations indicated prejudice or caprice. Anglin v. State, 553 S.W.2d 616, 620-21 (Tenn. Crim. App. 1977), cert. denied, (Tenn. June 6, 1977), states that brevity of the time of deliberation does not indicate passion, prejudice, caprice, or misconduct on the part of the jury. Guided by Anglin, we reject the defendant's contention that the short amount of time the jury deliberated is proof of being tainted by pretrial publicity.

The record reveals that the defendant used only four of his sixteen peremptory challenges. It has been generally recognized as a rule in this state that the failure to challenge for cause or the failure to use any available peremptory challenge to remove objectionable jurors precludes reliance upon the alleged disqualifications of jurors on appeal. See Adams v. State, 563 S.W.2d 804, 807 (Tenn. Crim. App. 1978), cert. denied, (Tenn. Apr. 10, 1978) (citing Sommerville v. State, 521 S.W.2d 792 (Tenn. 1975)). Moreover, despite his argument that the extensive and "sensational" coverage by the media denied him a fair trial, the defendant has failed to direct this Court to any

specific portion of the record, in particular the voir dire examination of the jurors, indicating the biased character of the jurors actually selected. One who is reasonably suspected of murder cannot expect to remain anonymous. With consideration of the defendant's failure to exhaust all peremptory challenges, the careful supervision of voir dire by the trial court, and the assertion by the jurors that they could and would give the defendant a fair and impartial trial, we cannot conclude that the trial court abused its discretion in removing the case to Lake County. This claim is without merit.

II. REDACTED STATEMENT OF DEFENDANT

Prior to the testimony of State's witness Jim Porter, the prosecution discussed the manner in which the defendant's confession would be introduced and the problems with redacted portions of the statement. A typed transcript was used, and the trial court permitted, over defense objection, copies of the transcript to be passed to jurors to read along with Investigator Porter. The trial court observed that the record needed to reflect that there is a "recorded statement . . . written statement that we have [that] has been redacted to take out any reference to any crime other than this particular Ray Patterson crime." It was understood that the redacted portion of the statement would not be read to the jury.

The defendant now complains that Investigator Porter was improperly permitted to read into evidence the following redacted portions of Thacker's statement:

DEFENDANT:	And after he ran the credit card number through, – he got through and pretty much know what happened from there.
PORTER:	Well, I want you to tell me.
DEFENDANT:	Well, he wasn't gonna give my credit – my card back 'cause I couldn't pay the bill.
PORTER:	Okay.
DEFENDANT:	<u>And I knew I was wanted in other states</u>, so I just stabbed him and took off.
	. . .
PORTER:	Camping? Okay. Okay, where did you get this Oldsmobile Cutlass, Steve?
DEFENDANT:	From Boyd. That was his Cutlass.
PORTER:	You take anything from that house – his house?
DEFENDANT:	Just some camping gear, and that's where the knife came from that I stabbed Patterson with.

(Emphasis added.) The defendant submits that "the error of the trial [c]ourt in allowing the improperly redacted statement to be read in open [c]ourt to the jury, and the prosecutorial misconduct of the District Attorney General in presenting and eliciting the harmful testimony from Investigator Porter, constitute harmful, reversible error." The defendant further complains that the prosecution's use of these statements during closing argument also constitutes reversible error. In

this regard, the defendant maintains that the use of these statements are in contravention of Rule 404(b), Tennessee Rules of Evidence.

The State initially responds by asserting that any objection thereto is waived for failure to enter a contemporaneous objection to the introduction of the statements. See Tenn. R. App. P. 36(a). The defendant's failure to raise a contemporaneous objection to this testimony as being a prior bad act effectively waives this issue. See, e.g., State v. Thompson, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000), perm. to appeal denied (Tenn. Mar. 17, 2000); State v. Adkisson, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994). Notwithstanding waiver, we elect to address the issue on its merit.

As a general proposition, evidence of a defendant's prior crimes, wrongs, or acts is not admissible to prove that he committed the crime in question. Tenn. R. Evid. 404. The rationale underlying the general rule is that admission of such evidence carries with it the inherent risk of the jury convicting the defendant of a crime based upon his bad character or propensity to commit a crime, rather than the conviction resting upon the strength of the evidence. State v. Rickman, 876 S.W.2d 824, 828 (Tenn. 1994). The risk is greater when the defendant's prior bad acts are similar to the crime for which the defendant is on trial. Id.; see also State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996). While such evidence usually does not come in the form of statements or confessions made by the defendant, there exists no valid reason to make an exception to the requirements for prior bad act evidence disclosed in a defendant's confession.

Evidence of a defendant's prior crimes, wrongs or acts may be admissible where it is probative of material issues other than conduct conforming with a character trait. Tenn. R. Evid. 404(b). Thus, evidence of a criminal defendant's character may become admissible when it logically tends to prove material issues which fall into one of three categories: (1) the use of "motive and common scheme or plan" to establish identity, (2) to establish the defendant's intent in committing the offense on trial, and (3) to "rebut a claim of mistake or accident if asserted as a defense." McCary, 922 S.W.2d at 514. In order for such evidence to be admitted, the rule specifies three prerequisites:

> (1) The court upon request must hold a hearing outside the jury's presence;
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
> (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). A fourth prerequisite to admission is that the court find by clear and convincing evidence that the defendant committed the other crime. Tenn. R. Evid. 404, Advisory Comm'n Comment; State v. DuBose, 953 S.W.2d 649, 654 (Tenn. 1997); State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985).

In reviewing a trial court's decision to admit or exclude evidence, an appellate court may disturb the lower court's ruling only if there has been an abuse of discretion. DuBose, 953 S.W.2d at 652; State v. Baker, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1980). Where the trial court has been called to pass upon the admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b), its determination is entitled to deference when it has substantially complied with the procedural requisites of Rule 404(b). See DuBose, 953 S.W.2d at 652.

In the present case, we first acknowledge that the trial court was unable to conduct a jury-out hearing due to the defendant's failure to object. Notwithstanding, we are cognizant that the trial court stated that the confession had been redacted to take out any reference to any crime other than the instant offense.

A. "And I knew I was wanted in other states, so I stabbed him."

This statement is relevant to explain the defendant's motive for the murder of the victim and that the murder was committed premeditatively. The statement that he was wanted in other states did not reveal the nature of the offenses for which he was wanted. Moreover, the statement proved a relevant non-character purpose, i.e., his motive, for stabbing the victim with the requisite mental state. Motive is a relevant circumstantial fact that refers to why a defendant did what he did. Evidence of motive is often pertinent as the basis to infer that the act was committed, to prove requisite mental state, or to prove the identity of the actor. See 22 C. Wright & K. Graham, Jr., Federal Practice and Procedure Evidence § at 479 (1978). Indeed, the defendant's possession of a motive strengthens the inference that the death of the victim was caused by an intentional act rather than by a natural accident. There is sufficient evidence to show that the defendant's "wanted" status was relevant to show motive and that motive was a relevant noncharacter purpose in this case. The State did not seek its introduction for propensity purposes. Finally, in making a risk versus benefit analysis in this case, we cannot conclude that the prejudicial impact of the statement outweighed its probative value. Accordingly, the admission of the statement was not error nor was the fact that the prosecutor referred to the admission during closing argument.

B. Statements Made In Reference to Boyd's Oldsmobile Cutlass

During his confession, the defendant responded that he got the Oldsmobile Cutlass from Boyd and that he had taken camping equipment from Boyd's house. We cannot conclude that this statement is evidence of prior bad acts. There is no reference to any theft on behalf of the defendant, and there is no reference to the murder of Forrest Boyd. Accordingly, there was no error in the admission of the statement referring to property taken from Forrest Boyd. Any claim that the admission or reference to this statement was error is without merit.

III. TESTIMONY OF SHERIFF PARSON

Prior to Sheriff Mike Parson of Polk County, Missouri, taking the stand, the defense objected and the following colloquy occurred:

MR. STRAWN: . . . We believe that the information that's going to be elicited from him has already been elicited from other witnesses. We think the danger of the jury being tainted with a potential crime that occurred in another state is too great.

THE COURT: What's the purpose of this witness?

GENERAL BIVENS: Your Honor. He is the one who advised them that Mr. Thacker – he is the one who advised them that Mr. Thacker was a suspect when he was called about the credit card, and that Thacker would be in the car. He described the car to them and gave them the license number. I'll be glad to lead him, Your Honor, and I have cautioned him I'm only going to ask him about the fact that Forrest Boyd was not in Tennessee on January 2nd, that Mr. Thacker was thought to be in possession – was a suspect to be in possession of Mr. Boyd's credit card and car, and that he gave them a description of the car and the license number. I'm not going to touch anything else with him.

THE COURT: Can't we simply – y'all are not in a position where you can stipulate that?

MR. KELLY: It's already in the record that it's Forrest Boyd's card laying there by the machine. It's already been testified to.

GENERAL BIVENS: That's why I don't see any prejudice in it, Your Honor. It establishes how they had that information.

MR. KELLY: What it's going to get in is, it's going to get in an unconvicted prior bad act of a theft in Missouri, without question. You know, it's not for any other purpose.

GENERAL BIVENS: Your Honor, it goes to the question of premeditation. He knew that he was over here in somebody else's car and with somebody else's credit card, and when that credit card was used, he knew it was gonna come back as stolen.

MR. KELLY: That's already in the record.

THE COURT: No, that's not in the record. The only thing that's in the record is that he used a credit card that's Forrest Boyd's.

MR. KELLY: Unauthorized - -

GENERAL BIVENS: No, sir, there's nothing in the record on that point. That's what we have to establish through him, that he was not authorized to have Forrest Boyd's credit card, and the only way we can establish that –

THE COURT: How can he do that?

GENERAL BIVENS: He actually knows. Your Honor, that Forrest Boyd was dead at that point, and he actually knows about the homicide. They were aware of the homicide.

MR. STRAWN: You see how great the danger is here?

GENERAL BIVENS: But I'm not going to that point, Your Honor, but he had knowledge that the credit card was stolen.

. . .

GENERAL BIVENS: It goes to his premeditation.

THE COURT: –but it does go the issue of premeditation. All right, I'm going to let you put it in, but be careful, now. Being careful goes – it's a two-edged sword. It goes both ways. You could get the wrong information and end it on a mistrial here.

. . .

THE COURT: And by the same token, if you solicit the information –

MR. STRAWN: Your Honor, we almost can't even cross him, because it's so dangerous. . . . And I think it's too dangerous. It's going to get in a prior – an unconvicted prior bad act.

THE COURT: That's why I'm asking you why you can't stipulate that he had or was in possession of a Forrest Boyd credit card, and he was unauthorized to use it?

MR. KELLY: We can.

THE COURT: You can? Then what else do you need him for?

GENERAL BIVENS: Your Honor, they were told that – he told the description of the vehicle and the license plate number. That's the main thing. If they want to stipulate that he had Forrest Boyd's car and credit card and was unauthorized –

MR. KELLY: What's his car got to do – identity is not an issue.

GENERAL BIVENS: Still, Your Honor, it goes to the premeditation and flight. That's the car that was towed here.

THE COURT: I don't know that you have to get the car into it.

GENERAL BIVENS: That's the car that was towed in, Your Honor. Otherwise, the jury is going to have the impression, Your Honor, that he had this car over here and –

MR. STRAWN: It's the credit card that he's saying goes to premeditation. We're stipulating that's unauthorized.

GENERAL BIVENS: No, sir, it's the car and the credit card. He knew he was wanted because of that, Your Honor.

. . .

GENERAL BIVENS: The question is premeditation, Your Honor. The question is Thacker knew he was wanted, knew that he was and that's why he did this. That's in his statement, Your Honor, just the statement that he knew he was wanted is in his confession, not for what, but that he knew he was wanted, and that's why he did it.

THE COURT: All right, I'm going to allow him to testify. Now, be careful.

Sheriff Mike Parson testified, during the guilt phase, that Forrest Boyd was a resident of Polk County, Missouri, on January 2, 2000. He further stated that he advised Dyer County law enforcement that Mr. Boyd was not in Dyer County and that anyone who had his credit card or vehicle in Dyer County would have been unauthorized. Sheriff Parson related a description of Mr. Boyd's vehicle, including providing the license plate number. The Sheriff added that a person by the name of Steven Ray Thacker may be in possession of both the credit card and the vehicle.

Sheriff Parson testified again at the sentencing phase. Sheriff Parson stated that on January 2, 2000, there were outstanding warrants for the arrest of Steven Ray Thacker in Polk County, Missouri. He added that he believed that Steven Ray Thacker left the state of Missouri in Forrest Boyd's vehicle.

The defendant complains that the trial court erred by admitting the testimony of Sheriff Parson. The defendant asserts that (1) the trial court failed to conduct a jury out hearing as required by Rule 404(b), Tennessee Rules of Evidence; (2) the defense agreed to stipulate to the fact that the defendant was in possession of Forrest Boyd's credit card and was unauthorized to use it; and (3) the prejudicial effect of the Sheriff's testimony outweighed any probative effect it may have had. In support of these contentions, the defendant states that the testimony of Sheriff Parson was neither relevant nor necessary, because it was already in the record that the credit card of Forrest Boyd was lying beside the cash register in the Patterson service station. From this, he contends, the jurors could infer that the credit card was stolen. The State responds that the evidence was necessary to show motive and, therefore, relevant to the issue of premeditation.

The general parameters regarding admissibility of a defendant's bad acts other than the crime on trial is found in Tennessee Rule of Evidence 404(b). As stated previously, evidence of prior crimes, wrongs, or acts is generally inadmissible as character evidence of the defendant to prove that he committed the crime in question. Tenn. R. Evid. 404(b).

As the defense argues, the defendant's identity was not at issue. Rather, the only issue in this matter was the degree of homicide, the defendant's state-of-mind. Rule 404(b) provides that evidence of other crimes, wrongs, or acts may be admissible for purposes other than to prove the character of a defendant, only if certain conditions are met:

> (1) The court upon request must hold a hearing outside the jury's presence;
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
> (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

First, we note that the trial court was required to hold a hearing on the admissibility of Rule 404(b) evidence only upon request. (emphasis added). The defendant failed to request a 404(b) hearing.

Thus, the trial court did not err by failing to conduct a hearing. Technically, it is waived. State v. Jones, 15 S.W.3d 880, 895 (Tenn. Crim. App. 1999).

Next, the State sought to introduce evidence (1) that Forrest Boyd was not in Dyer County, Tennessee, on January 2, 2000; (2) that the defendant's possession of Forrest Boyd's credit card was unauthorized; and (3) a description of the vehicle. This evidence was relevant to establish premeditation. While evidence had already been introduced that Forrest Boyd's credit card was found at the scene of the murder, no evidence was before the jury at that time that the defendant's possession of the credit card was unauthorized. Similarly, there was no other evidence establishing the fact that the defendant's use of Mr. Boyd's vehicle was unauthorized. Thus, Sheriff Parson's testimony was highly relevant in establishing the defendant's motive for the murder.

Finally, we conclude that the evidence was more probative than prejudicial. The State's examination of Sheriff Parson and Sheriff Parson's responses were restricted to very vague inquiries as to the presence of Forrest Boyd in Dyer County and whether the use of his credit card and/or car in Dyer County were authorized. No information was elicited regarding the murder of Forrest Boyd. Indeed, there is no indication from the testimony that Forrest Boyd is deceased. Additionally, the prosecution was careful to not elicit the term "theft," "steal," or an equivalent term from Sheriff Parson. Therefore, for the reasons stated, we conclude that the testimony of Sheriff Parson did not invoke error.

[Deleted: IV. PROOF OF DEATH BY LAY TESTIMONY]

V. PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT

During closing argument, the prosecutor made the following comment:

> And Mr. Kelly says he's sorry. Where's the evidence that he's sorry? Is dragging Ray Patterson's body across the parking lot of that service station into that bay, is that showing I'm sorry? Is taking this dead man's wallet, pistol, credit cards, showing I'm sorry, I'm sorry? Does taking this wrecker out and getting his car off and then coming back into town and getting other means of escape show I'm sorry, I'm sorry? When he sees Jim Porter in AutoZone, does he go up and say, "Officer, I'm sorry. In a fit of passion, I killed a man. I'm sorry." No. He tries to cover up his crime. He trades cars. He leaves town. He makes an escape route at the motel where he goes. He dyes his hair so he won't look the same. Now, is that somebody who is sorry, or is that somebody who has planned and cold-bloodedly, premeditatedly killed somebody?

The defendant moved for a mistrial based upon the prosecutor's comment to the jury that they had heard nothing remorseful from any witnesses and that the comment was an improper comment regarding the defendant's failure to testify. The State responded that "Mr. Kelly made the argument in his closing that the defendant was remorseful and sorry. My comment was that there was no

evidence of remorse or sorrow." The trial court denied the defendant's motion. The defendant now complains that this was error.

Where a defendant complains of a prosecutor's closing argument, he is required to show that the argument was so inflammatory or the conduct so improper that it affected the verdict to his detriment. Harrington v. State, 215 Tenn. 338, 340, 385 S.W.2d 758, 759 (1965). A prosecutor is strictly prohibited from commenting on the defendant's decision not to testify. State v. Reid, 91 S.W.3d 247, 297 (Tenn. 2002); Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995). However, we do not conclude that the statements made by the prosecutor constitute a comment on the defendant's failure to testify. During closing argument, counsel for the defendant remarked:

> I am very sorry that Mr. Patterson is deceased. I knew Mr. Patterson, I know his family, and I'm very sorry this happened. And so is my client. By we can't undo that. And you're not to use – the Court's gonna tell you you're not to use sympathy in deciding what the appropriate offense is that Mr. Thacker committed.

The statements made by the prosecution were rebuttal argument directed to the defense counsel's earlier argument that the defendant was sorry about the murder. The gist of the prosecutor's comments was directed more toward the defendant's actions and omissions after the killing, rather than the defendant's failure to testify. We do not think the statement can be fairly characterized as a comment on the defendant's failure to testify. See generally State v. Miller, 771 S.W.2d 401, 405 (Tenn. 1989). Thus, there was no error committed by the trial court in refusing to grant a motion for mistrial on this basis.

VI. FAILURE TO PERMIT ARGUMENT & INSTRUCTION ON SELF-DEFENSE

During a jury instruction conference prior to closing arguments at the guilt phase, the trial court inquired as to a charge of "self-defense." The prosecution objected stating:

> [I]t has to be raised by the proof. It can't be strictly an argument. There has to be some proof of self-defense, and there is absolutely nothing in this testimony or proof that indicates self-defense, Your Honor.

Counsel for the defendant responded:

> There's evidence of a firearm on the victim, Your Honor, and evidence that it was loaded. I just think that raises enough of an inference for us to argue it.

The trial court concluded that there was no proof that the victim had ever "pulled" his weapon on the defendant and the charge was not provided.

To determine whether self-defense is fairly raised by the proof and must be instructed to the jury, "a court must, in effect, consider the evidence in the light most favorable to the

defendant, including drawing all reasonable inferences flowing from that evidence." State v. Shropshire, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993). A person is justified in using force against another person when he or she reasonably believes (1) that death or serious bodily injury is imminent, and (2) that the force used is immediately necessary to protect against the other person's use or attempted use of unlawful force. Tenn. Code Ann. § 39-11-611(a). On the other hand, a person is not justified in using or threatening force against another if he or she provoked the other person's use or attempted use of unlawful force unless (1) he or she "abandons the encounter or clearly communicates to the other the intent to do so," and (2) the other person still persists in using unlawful force. Tenn. Code Ann. § 39-11-611(d)(1)-(2). A defendant who seeks to avoid criminal responsibility for his conduct upon a theory of self-defense must be free from fault in bringing about the necessity of using force or should have clearly abandoned his initial intent to do harm. See State v. Dereke Emont Fitzgerald, No. W2000-01279-CCA-R3-CD (Tenn. Crim. App. at Jackson, Oct. 24, 2000).

Even considering the evidence in the light most favorable to the defendant, we cannot conclude that the evidence raised a factual issue as to whether the defendant acted in self-defense. Although several witnesses testified that the victim carried a weapon, there was no evidence that the victim was the aggressor who pulled his gun on the defendant. According to the defendant, the victim tried to pull his gun out only after Thacker had stabbed him. Moreover, Thacker admitted that he stabbed the victim as the victim was facing toward the credit card machine with his back toward him. There is simply no objective basis for us to find that the defendant *reasonably* believed that he was in imminent danger of death or serious bodily injury. Accordingly, the refusal to instruct the jury on self-defense was not error.

[Deleted: VII. SUFFICIENCY OF THE EVIDENCE]

VIII. SUPPRESSION OF DEFENDANT'S CONFESSION

On March 22, 2000, the defendant filed a motion to suppress or determine the admissibility of his confession made to law enforcement officials.[1] A hearing on the motion was held on August 25, 2000. At the hearing, the State presented Officer Tack Simmons. Officer Simmons related the events immediately preceding the defendant's arrest at the Super 8 Motel in Union City. Specifically relating to the defendant's initial arrest, Officer Simmons stated that, after detaining the defendant, Officer Simmons inquired as to the defendant's name. The defendant replied, "Steve Patterson." Recalling that the victim's name was Patterson, Officer Simmons surmised that Patterson was not the defendant's true identity. At this time, the defendant was placed in handcuffs. While the defendant was being placed in Officer O'Dell's patrol car, Officer Simmons advised him of his rights. The defendant indicated that he understood his rights. Officer O'Dell then transported the

[1] The motion to suppress filed by defense counsel was generic in nature and also challenged any evidence seized as the result of any searches. As the defendant limits his argument on appeal to the suppression of his confession, we will do the same.

defendant to the county jail. O'Dell stated the distance to the Obion County Jail was approximately "a mile and a quarter." On the way to the jail, the defendant

> made a spontaneous utterance that we did better than the Springfield police. I asked him what he was talking about. He said that – To quote him, what I have in my notes, "You did a better job than Springfield. They walked by me for four days while I hid in the woods." And I ask[sic] why they were looking for him, and Mr. Thacker stated who was looking for him. Mr. Thacker stated "the police." I asked why they were looking for him. Mr. Thacker stated, "Because it was a stolen car." I asked him if the victim of the stolen car was still with us, meaning . . . was she still alive. Mr. Thacker stated, "Yeah, she made it. She jumped out of the car, leaving the kid, and got away." Then he stated, "I didn't hurt the kid. I dropped the kid and grandmother off at a relative's house, and the police started chasing me from there." And that was the end of our conversation.

Officer O'Dell testified that, during the trip to the jail, the defendant was "very calm" and did not exhibit any strange behavior. Officer O'Dell verified that the defendant had indicated to Officer Simmons that he understood his rights. The defendant did not ask for counsel during this time. Dyersburg Police Officer Terry Ledbetter, along with Captain Dudley, transported the defendant from the Obion County Jail to the Dyersburg Police Department. Nothing was said to the defendant on the way to Dyersburg other than a general inquiry as to whether the defendant had a cold. The defendant was turned over to Investigator Jim Porter upon arriving at the Police Department.

Investigator Porter stated that he escorted the defendant to an interrogation room. No written advisement or waiver of rights was used; rather, Investigator Porter recorded both the advisement of rights and the defendant's subsequent statement. Investigator Porter recalled that the defendant appeared to understand what he was saying and did not appear to be under the influence of drugs or alcohol. Porter proceeded to advise the defendant of his rights and that he was going to be charged with first degree murder. He continued to inquire as to whether the defendant understood his rights and whether he "wanted to talk . . . about it." The defendant responded that he wished to give a statement. Relating the specific circumstances of the interrogation, Porter recalled that the defendant was only in the interrogation room for approximately two minutes prior to the interview commencing, the defendant was offered and accepted a cigarette, and the interview lasted approximately fifteen to twenty minutes. At no time was the defendant advised that if he provided a statement, "things would go a lot better for him." During the interview, the defendant admitted that he killed the victim. The defendant also stated how and why he killed the victim. Investigator Porter testified that throughout the defendant's statement, the defendant remained "calm and collected."

At the conclusion of the hearing, the defense advised the court that the defendant would be having a mental evaluation the following day and that this evaluation might provide evidence of mental disease or disturbance. Notwithstanding, the trial court opted to rule upon the evidence before it and found:

> [W]ith the evidence that's before the Court on the Motion to Suppress, the Court will overrule the Motion to Suppress, the statement of Mr. Thacker given to Officer, excuse me, to Investigator Porter. There just simply is nothing there to – as a basis at this point for the Court to suppress any such statement. It appears that from the evidence before the Court at the present time that the defendant was advised of his rights by Officer Simmons and by Officer Porter. . . .

The defendant asserts that the trial court erred when it denied his motion to suppress his confession. Specifically, the defendant asserts that his "alleged confession, given soon after his arrest to Investigator Jim Porter, should have been suppressed, in view of the testimony of Dr. Keith Caruso that he suffered from a severe mental illness - bipolar disorder - and a severe mental disturbance on the date the crime was committed, January 2, 2000." The defendant argues that "it is clear from the evidence that he was not mentally capable of making a decision concerning giving a statement or not giving a statement and about waiving his constitutional rights to counsel." Additionally, the defendant asserts that he was without counsel in an oppressive, coercive, police-dominated atmosphere at the Dyersburg Police Department. He concludes that his mental disturbance, coupled with the coercive police atmosphere, rendered his confession involuntary.

We review the trial court's denial of the defendant's motion to suppress by the following well-established standard:

> Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld. In other words, a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). However, the trial court's application of law to the facts, as a matter of law, is reviewed *de novo*, with no presumption of correctness. State v. Daniel, 12 S.W.3d 420, 423 (Tenn. 2000). This court may consider the proof at trial, as well as at the suppression hearing, when considering the appropriateness of the trial court's ruling on a pretrial motion to suppress. See State v. Henning, 975 S.W.2d 290, 299 (Tenn.1998) (holding that because the rules of appellate procedure "contemplate that allegations of error should be evaluated in light of the entire record[,]" an appellate court "may consider the proof adduced both at the suppression hearing and at trial").

State v. Levitt, 73 S.W.3d 159, 169 (Tenn. Crim. App. 2001).

The Fifth Amendment to the United States Constitution provides in part that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

Similarly, Article I, section 9 of the Tennessee Constitution states that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. However, an accused may waive this right against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). In Miranda, the United States Supreme Court held that a suspect must be warned prior to any questioning that he has the right to remain silent; that anything he says can be used against him in a court of law; that he has the right to the presence of an attorney; and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. 384 U.S. at 479. The Supreme Court held that a suspect may knowingly and intelligently waive the right against self-incrimination only after being apprised of these rights. Id. Accordingly, for a waiver of the right against self-incrimination to be held constitutional, the accused must make an intelligent, knowing, and voluntary waiver of the rights afforded by Miranda. Id. at 444. A court may conclude that a defendant voluntarily waived his rights if, under the totality of the circumstances, the court determines that the waiver was uncoerced and that the defendant understood the consequences of waiver. State v. Stephenson, 878 S.W.2d 530, 545 (Tenn.1994).

The United States Supreme Court has interpreted the Fifth Amendment in part to require that an incriminating statement or confession be freely and voluntarily given in order to be admissible. Bram v. United States, 168 U.S. 532, 542-43, 18 S. Ct. 183, 42 L. Ed. 568 (1897). This even applies to statements obtained after the proper Miranda warnings have been issued. See State v. Kelly, 603 S.W.2d 726 (Tenn. 1980). Statements and confessions not made as a result of custodial interrogations must also be voluntary to be admissible. See Arizona v. Fulimante, 499 U.S. 279, 286-88, 111 S. Ct. 1246, 1252-53 (1991). It must not be extracted by "any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." Bram, 168 at 542-43, 18 S. Ct. at 187 (citation omitted). Moreover, due process requires that confessions tendered in response to either physical or psychological coercion be suppressed. Rogers v. Richmond, 365 U.S. 534, 540-41, 81 S. Ct. 735, 739 (1961); Kelly, 603 S.W.2d at 728-29. This has evolved into the "totality of circumstances" test to determine whether a confession is voluntary. Fulimante, 499 U.S. at 285-87, 111 S. Ct. at 1251-52; State v. Crump, 834 S.W.2d 265, 271 (Tenn.), cert. denied, 506 U.S. 905, 113 S. Ct. 298 (1992).

The voluntariness test under the Tennessee Constitution has been held to be more protective of individual rights than the test under the United States Constitution. See Stephenson, 878 S.W.2d at 544. For the relinquishment of rights to be effective, the defendant must have personal awareness of both the nature of the right and the consequences of abandoning his rights. See id. at 544-45. Additionally, his statements cannot be the result of intimidation, coercion or deception. Id. at 544. In determining whether the statements were voluntary, the reviewing court looks at the totality of the circumstances surrounding the relinquishment of the right. Id. at 545.

The trial court found that the statements were made voluntarily. We have studied the evidence, and considering the totality of the circumstances, we cannot conclude that the trial court erred by denying the defendant's motion to suppress on this issue. Again, the court's determination that the statements were given knowingly and voluntarily is binding upon the appellate courts unless the defendant establishes that the evidence in the record preponderates against the trial court's ruling.

Henning, 975 S.W.2d at 299. In the instant case, the defendant asserts that "coercive police tactics" combined with his mental disease/defect rendered his confession/statements involuntary. The record reveals that the defendant was properly advised of his rights under Miranda and that the defendant indicated that he understood those rights. When the voluntariness of a statement given to police is challenged based on the defendant's competency to waive the rights provided by Miranda, the determinative issue is "whether the defendant had the capacity in the first place to form a will of his own and to reject the will of others." State v. Benton, 759 S.W.2d 427, 431 (Tenn. Crim. App. 1988). The defendant presented no evidence of his mental condition at the motion to suppress. Notwithstanding, Dr. Caruso did testify at the subsequent trial regarding the defendant's mental condition. Dr. Caruso conceded that the defendant was competent to stand trial and that a defense of insanity could not be supported in this case. He further admitted that "[he] didn't feel that there was anything here that prevented Mr. Thacker from forming the mens rea for the alleged offenses." In other words, the defendant "knew what the expected outcome of a murder was;" "[h]e was able to form a motive for that murder," and "[h]e was able to understand that that murder was wrong and against the law." Although the defendant was diagnosed as suffering from bipolar disorder, we cannot rationally conclude that the defendant was incapable of understanding his rights and providing a voluntary statement. Moreover, from the proof at the suppression hearing, we would be constrained to conclude that coercive police tactics were not employed. We have reviewed the record and find that the evidence does not preponderate against the trial court's ruling. See Henning, 975 S.W.2d at 299. Thus, the defendant is not entitled to relief on this issue.

[Deleted: IX. LIMITATION ON MITIGATING EVIDENCE]

[Deleted: X. PROSECUTORIAL MISCONDUCT OF PRIOR BAD ACTS EVIDENCE]

[Deleted: XI. LIMITATION ON TESTIMONY OF DEFENDANT'S MENTAL CONDITION]

XII. STATE'S ARGUMENT REGARDING LIFE WITHOUT PAROLE

The defendant asserts that the prosecutor, on more than one occasion, made an incorrect statement of the law to the jury. Specifically, he contends that the prosecutor repeatedly told the jurors that the mitigating factors have to outweigh the aggravating factors beyond a reasonable doubt in order to impose a sentence of life without the possibility of parole. During opening argument at the sentencing phase, the prosecutor remarked:

> [A]t the end, you're going to be asked to make a decision. The judge is going to instruct you that if you find that there are at least one aggravating circumstance and that there are no mitigating circumstances, you have to impose the death penalty. If you find that there are aggravating circumstances and that there are mitigating circumstances and that the aggravating circumstances outweighs, beyond a reasonable doubt, that mitigating circumstance, you impose the death penalty. If you find that those mitigating circumstances do outweigh that aggravator, but there is an

> aggravator there, beyond a reasonable doubt, but these mitigators outweigh it beyond a reasonable doubt, you impose life without parole. If you find that there are no aggravating circumstances at all, you impose a sentence of life in prison.

Later, during closing argument, the prosecutor stated:

> [R]emember the taker and the giver? Is that mitigating circumstance beyond a reasonable doubt greater than those aggravators? No. Your only choice in this case, with those two aggravators, and if you find a mitigator, but a mitigator that does not outweigh those aggravators beyond a reasonable doubt, is to impose the death penalty.

And, again, in rebuttal closing:

> [W]hat you've got to look at are those aggravators and if you feel there are mitigators there and if you feel that those mitigators outweigh those aggravators.
> . . .
> You have to find not only that there's mitigating factors to not impose the death penalty, you've got to find that those mitigators outweigh that aggravator. The proof is, beyond a reasonable doubt, they don't.

At the close of argument, defense counsel requested a curative instruction from the court relating to the erroneous statement of law made by the State. The trial court denied the request, stating that any error was cured by the jury charge, which will advise the jury as to the applicable law.

As asserted by the State, the defendant failed to make a contemporaneous objection to the prosecutor's comments. Failure to object to a prosecutor's alleged misconduct during closing argument waives later complaint. State v. Little, 854 S.W.2d 643, 651 (Tenn. Crim. App.1992). The failure to object to the prosecutor's statements results in waiver on appeal. State v. Thornton, 10 S.W.3d 229, 234 (Tenn. Crim. App. 1999) (citing Tenn. R. App. P. 36(a)).

Notwithstanding waiver, we note that Tennessee Code Annotated section 39-13-204, provides, in relevant part:

> If the jury unanimously determines that no statutory aggravating circumstance has been proven by the state beyond a reasonable doubt, the sentence shall be imprisonment for life. . . .
> . . .
> If the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven by the state beyond a reasonable doubt, but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstance or circumstances beyond a reasonable doubt, the jury shall, in its considered discretion, sentence the defendant either to imprisonment for

> life without possibility of parole or imprisonment for life. The trial judge shall instruct the jury that, in choosing between the sentences of imprisonment for life without possibility of parole and imprisonment for life, the jury shall weigh and consider the statutory aggravating circumstance or circumstances proven by the state beyond a reasonable doubt and any mitigating circumstance or circumstances. . . .
> . . .
>
> If the jury unanimously determines that:
> (A) At least one (1) statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt; and
> (B) Such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt; then the sentence shall be death.

Tenn. Code Ann. § 39-13-204(f)(1), (2), (g)(1). The trial court instructed the jury in accordance with the statute. The jury is presumed to follow the instructions of the trial court. State v. Walker, 910 S.W.2d 381, 397 (Tenn. 1995), cert. denied, 519 U.S. 826, 117 S. Ct. 88 (1996). Moreover, from the context of the prosecutor's comments, one can reasonably infer that the prosecutor's intent was not to misinform the jurors but merely to emphasize the proof needed to impose a sentence of death, i.e., aggravating circumstances must outweigh mitigating circumstances. We cannot conclude that the improper argument by the State affected the verdict to the defendant's prejudice. This claim is without merit.

[Deleted: XIII. LIMITATION OF DEFENSE TO STATUTORY MITIGATORS]

XIV. VICTIM IMPACT TESTIMONY

At the sentencing hearing, the State presented the testimony of Elizabeth Patterson, the wife of the victim. Elizabeth Patterson stated that she and the victim had been married for thirty-five years at the time of his death. The couple had three grown children. Mrs. Patterson related that her husband was her sole source of financial support prior to his murder. Since his death, Mrs. Patterson has had no income, and she had to borrow money to pay for their gravesites. She further explained that she was forced to borrow money until she received the insurance proceeds. Emotionally, Mrs. Patterson stated, "I lost my best friend and companion. And I can't sleep at night in my bed. I sleep on my couch." Mrs. Patterson described her husband as "a good man. He was a good Christian man. He would help anybody out." She proceeded to describe incidents of where her husband would tow people for free, specifically recalling an incident involving an elderly couple stranded on I-55.

The defendant challenges admission of this victim impact evidence on grounds that (1) the testimony of Elizabeth Patterson was unduly prejudicial and (2) that Mrs. Patterson's testimony was admitted prior to evidence of one or more aggravating circumstances being established. The defendant also asserts that the prosecutor improperly argued victim impact during closing argument.

In State v. Nesbit, 978 S.W.2d 872, 889 (Tenn. 1998), our supreme court held that "victim impact evidence and argument is [not] barred by the federal and state constitutions." See State v. Austin, 87 S.W.3d 447, 463 (Tenn. 2002); State v. Reid, 91 S.W.3d 247, 280 (Tenn. 2002); see also Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609 (1991) (holding that the Eighth Amendment erects no *per se* bar against the admission of victim impact evidence and prosecutorial argument); State v. Shepherd, 902 S.W.2d 895, 907 (Tenn.1995) (holding that victim impact evidence and prosecutorial argument not precluded by the Tennessee Constitution). Notwithstanding the holding that victim impact evidence is admissible under Tennessee's death penalty sentencing scheme, the introduction of such evidence is not unrestricted. Nesbit, 978 S.W.2d at 891; see also Austin, 87 S.W.3d at 463.

> Although victim impact evidence is admissible, such evidence generally should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family.

Nesbit, 978 S.W.2d at 891; see also Reid, 91 S.W.3d at 280. Victim impact evidence may not be introduced if (1) it is so unduly prejudicial that it renders the trial fundamentally unfair; or (2) its probative value is substantially outweighed by its prejudicial impact. See Nesbit, 978 S.W.2d at 891; see also Austin, 87 S.W.3d at 463; State v. Morris, 24 S.W.3d 788, 813 (Tenn. 2000) (appendix), cert. denied, 521 U.S. 1082, 121 S. Ct. 786 (2001). There is no bright-line test in determining the admissibility of victim impact evidence; thus, the admissibility must be determined on a case-by-case basis. Nesbit, 978 S.W.2d at 891. Mrs. Patterson testified regarding her marriage to the victim, her financial dependence upon him, the emotional impact of his death upon her, and what type of person the victim was. This is the type of testimony contemplated by Nesbit. Accordingly, Mrs. Patterson's testimony was not unduly prejudicial.

To enable the trial court to supervise the admission of victim impact testimony, our supreme court has established certain procedural guidelines which must be followed before victim impact evidence may be admitted by the trial court. First, the State *must* notify the trial court of its intent to produce victim impact evidence. Nesbit, 978 S.W.2d at 891; Austin, 873 S.W.3d at 463. Second, upon receiving the State's notification, the trial court *must* hold a hearing outside the presence of the jury to determine the admissibility of the evidence. Nesbit, 978 S.W.2d at 891; Austin, 873 S.W.3d at 463. Finally, the trial court *should not* permit introduction of such evidence until the court determines that evidence of one or more aggravators is already present in the record. Nesbit, 978 S.W.2d at 891; Austin, 873 S.W.3d at 463. Although the admission of unduly prejudicial victim impact evidence may implicate due process concerns, the procedure established in Nesbit is not constitutionally mandated. Austin, 87 S.W.3d at 463.

In the present case, the State notified the trial court of its intent to introduce victim impact evidence, and the trial court conducted a jury-out hearing to determine the admissibility of the

evidence. However, the trial court failed to make a finding that proof of an aggravating circumstance existed in the record. The requirement that proof exists in the record of an aggravating circumstance before the presentation of victim impact evidence lessens the risk that the admission of unduly prejudicial victim impact evidence will render the trial fundamentally unfair. Austin, 87 S.W.3d at 464-65. Although the trial court failed to specifically find that proof existed in the record of an aggravating circumstance, Mrs. Patterson was the State's final witness to testify at the sentencing hearing. Accordingly, the proof of an aggravating circumstance preceded her testimony. The failure of the trial court to specifically make this finding on the record is harmless. Moreover, the defendant's argument that Mrs. Patterson was the first witness at the trial to testify and, therefore, no proof of an aggravator existed is without merit. Mrs. Patterson's testimony during the guilt phase is not "victim impact testimony."

Finally, the defendant asserts that the prosecutor engaged in "inflammatory rhetoric" during his closing argument at the sentencing phase. He argues that such "inflammatory rhetoric" "diverts the jury's attention from its proper role or invites an irrational, purely emotional response to the evidence" and is not permissible and "should not be tolerated."

> The prosecutor began closing argument at the sentencing phase stating:
> Ladies and Gentlemen, as I lay in bed last night with my wife of twenty-five years, I though about Liz Patterson. I thought about what she testified to, that she doesn't sleep in her bed anymore. She sleeps on the couch, because her husband of all those years is gone. I'm sad, and I felt sorry for Liz Patterson.

This was the only reference to Mrs. Patterson's testimony in approximately eight pages of closing argument made by the prosecutor. Initially, this Court acknowledges that the defendant failed to contemporaneously object to the prosecutor's statement. The defendant's failure to object to these comments constitutes waiver on appeal. See State v. Thornton, 10 S.W.3d 229, 234 (Tenn. Crim. App. 1999) (citing Tenn. R. App. P. 36(a)); State v. Green, 947 S.W.2d 186, 188 (Tenn. Crim. App. 1997); State v. Little, 854 S.W.2d 643, 651 (Tenn. Crim. App. 1992) (failure to object to prosecutor's alleged misconduct during closing argument waives later complaint).

Notwithstanding waiver, while victim impact argument by the prosecution about the evidence is permissible, restraint should be exercised. This Court has consistently cautioned the State against engaging in victim impact argument which is little more than an appeal to the emotions of the jurors, as such argument may be unduly prejudicial. Nesbit, 978 S.W.2d at 891; State v. Shepherd, 902 S.W.2d 895, 907 (Tenn. 1995) ("We caution the State to utilize such arguments advisedly."); State v. Bigbee, 885 S.W.2d 797, 808 (Tenn. 1994) ("[T]he State may risk reversal by engaging in argument which appeals to the emotions and sympathies of the jury."). Indeed, prosecuting attorneys must remember that jurors are to base their decision upon a reasoned moral response to the evidence. See California v. Brown, 479 U.S. 538, 542-43, 107 S. Ct. 837, 839-40 (1987). The jury should not be given the impression that emotion may reign over reason. In each case, the trial court must strike a careful balance. Nesbit, 978 S.W.2d at 892. Argument on relevant, though emotional, considerations is permissible, but inflammatory rhetoric that diverts the jury's attention from its

proper role or invites an irrational, purely emotional response to the evidence is not permissible and should not be tolerated by the trial court. Id. We cannot conclude that the brief statement made by the prosecutor constituted improper "inflammatory rhetoric." The statement was a brief reflection on the testimony of Mrs. Patterson and how her life has changed since her husband's murder. Although the statement may be considered emotional, we conclude that the statement was within the realm of acceptable argument.

Moreover, the jurors were properly instructed by the trial court regarding the function of victim impact evidence and that they were to apply the law as provided by the court. The jury is presumed to follow the instructions of the court. See State v. Walker, 910 S.W.2d 381, 397 (Tenn.1995), cert. Denied, 519 U.S. 826, 117 S. Ct. 88 (1996). With consideration of this mischaracterization of the function of victim impact testimony, the curative measure of the trial court, and the strength of the aggravating circumstances proven by the State, we conclude this issue is without merit.

[Deleted: XV. AGGRAVATING CIRCUMSTANCE (i)(6)]

XVI. CONSTITUTIONALITY OF TENNESSEE DEATH PENALTY STATUTES

The defendant raises numerous challenges to the constitutionality of Tennessee's death penalty provisions. Included within his challenge that the Tennessee death penalty statutes violate the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I, sections 8, 9, 16, and 17, and Article II, section 2 of the Tennessee Constitution are the following:

> 1. The requirement in Tennessee Code Annotated section 39-13-204(f) and (g) that the additional element of "aggravating circumstance" be proven beyond a reasonable doubt in a second proceeding after a conviction of first degree murder has in effect given the defendant a life sentence renders the statute unconstitutional as violating protections against double jeopardy.

This argument has been rejected by our supreme court. See Houston v. State, 593 S.W.2d 267, 276 (Tenn. 1980), overruled on other grounds by State v. Brown, 836 S.W.2d 530 (Tenn. 1992).

> 2. Tennessee Code Annotated section 39-13-204(c) permits the introduction of hearsay in the second stage of proceedings as evidence in the State's proof of aggravation or rebuttal of mitigation and thus violates the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 8 and 16 of the Tennessee Constitution.

As our supreme court has noted many times, hearsay is admissible in first degree murder sentencing hearings. See Austin, 87 S.W.3d at 459; State v. Odom,928 S.W.2d 18, 28 (Tenn.1996).

> 3. The sentencing system provided in Tennessee Code Annotated section 39-13-204 is so vague, broad, and internally contradictory that it results in the arbitrary and capricious imposition of the death penalty in Tennessee in violation of the United States and Tennessee Constitutions.

This argument was rejected in State v. Johnson, 762 S.W.2d 110, 119 (Tenn. 1988), cert denied, 489 U.S. 1091, 109 S. Ct. 1559 (1989).

> 4. The infliction of death as a punishment for a conviction for murder is without justification and so severe as to constitute "cruel and unusual punishment" prohibited by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Tennessee Constitution.

The defendant's argument that the death penalty by any means constitutes cruel and unusual punishment in violation of the state and federal constitutions has been repeatedly rejected by our appellate courts. See State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000), cert. denied, 532 U.S. 907, 121 S. Ct. 1233 (2001); State v. Pike, 978 S.W.2d 904, 925 (Tenn. 1998) cert. denied, 526 U.S. 1147, 119 S. Ct. 2025 (1999); State v. Nesbit, 978 S.W.2d 872, 902-03 (Tenn. 1998) cert. denied, 526 U.S. 1052, 119 S. Ct. 1359 (1999); State v. Vann, 976 S.W.2d 93, 118 (Tenn. 1998), cert. denied, 526 U.S. 1071, 119 S. Ct. 1467 (1999); State v. Blanton, 975 S.W.2d 269, 286 (Tenn. 1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1118 (1999); State v. Cribbs, 967 S.W.2d 773, 796 (Tenn.) cert. denied, 525 U.S. 932, 119 S. Ct. 343 (1998); State v. Cauthern, 967 S.W.2d 726, 751 (Tenn.) cert. denied, 525 U.S. 967, 119 S. Ct. 414 (1998).

> 5. The death penalty statute fails to sufficiently narrow the population of defendants convicted of first degree murder, who are eligible for a sentence of death in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 & 16 of the Tennessee Constitution.

Although the defendant fails to assert what aggravating circumstances fail to narrow the class of death-eligible defendants, with respect to the (i)(6) and (i)(7) aggravators applicable in the case *sub judice*, our supreme court has rejected such a claim on previous occasions. See Vann, 976 S.W.2d at 117-118 (appendix); State v. Keen, 926 S.W.2d 727, 742 (Tenn. 1994).

> 6. The death penalty statute fails to sufficiently limit the exercise of the jury's discretion because, once the jury finds aggravation, it can impose the sentence of death no matter what mitigation is shown, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 & 16 of the Tennessee Constitution.

This argument was rejected by State v. Smith, 857 S.W.2d 1, 21-22 (Tenn. 1993); see also Franklin v. Lynaugh, 487 U.S. 164, 178-80, 108 S. Ct. 2320, 2330 (1988); State v. Hurley, 876 S.W.2d 57, 69 (Tenn. 1993).

> 7. The death penalty statute fails to sufficiently limit the exercise of the jury's discretion by mandating the jury to impose a sentence of death if it finds the aggravating circumstances outweigh the mitigating circumstances in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 & 16 of the Tennessee Constitution.

This argument has previously been considered and specifically rejected by the Tennessee Supreme Court. See Smith, 857 S.W.2d at 22 (holding that Tennessee's death penalty statutes "do[ ] not in any way constitutionally deprive the sentencer of the discretion mandated by the individualized sentence requirements of the constitution").

> 8. The death penalty statutes fail to require the jury to make the ultimate determination that death is appropriate in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 & 16 of the Tennessee Constitution.

This argument has likewise been rejected by the supreme court. See State v. Hall, 958 S.W.2d 679, 718 (Tenn. 1997); State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994); Smith, 857 S.W.2d at 22.

> 9. The death penalty statutes fail to inform the jury of its ability to impose a life sentence out of mercy in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 & 16 of the Tennessee Constitution.

Our appellate courts have consistently rejected the argument that the "mercy instruction" is required at a capital sentencing hearing. See Cauthern, 967 S.W.2d at 749; State v. Bigbee, 885 S.W.2d 797, 813-14 (Tenn.1994); State v. Cazes, 875 S.W.2d 253, 269 n.6 (Tenn. 1994), cert. denied, 513 U.S. 1086, 115 S. Ct. 743 (1995).

> 10. The death penalty statutes provide no requirement that the jury make findings of fact as to the presence or absence of mitigating circumstances, thereby preventing effective review on appeal in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 & 16 of the Tennessee Constitution.

This claim was rejected in Cazes, 875 S.W.2d at 268-69.

> 11. The death penalty statutes prohibit the jury from being informed of the consequences of its failure to reach a unanimous verdict in the penalty phase in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 8, 9, 10, and 16 of the Tennessee Constitution.

Our supreme court has repeatedly rejected this argument. See Cribbs, 967 S.W.2d at 796 (appendix); Hall, 958 S.W.2d at 718; Brimmer, 876 S.W.2d at 87.

> 12. The death penalty statute allows the State to make final closing arguments to the jury in the penalty phase in violation of the defendant's right to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 9 of the Tennessee Constitution.

This claim has been rejected by our supreme court. Brimmer, 876 S.W.2d at 87 n.5; State v. Caughron, 855 S.W.2d 526, 542 (Tenn. 1993).

[Deleted: XVII. REVIEW PURSUANT TO TENNESSEE CODE ANNOTATED SECTION 39-13-206(c)]

[Deleted: Conclusion]

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JOHN EVERETT WILLIAMS, JUDGE